

Center for Health and Wellness Law, LLC

Center for Health and Wellness Law, LLC Winter 2021 Newsletter

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On January 7, 2021, the EEOC finally [released the proposed language](#) revising the wellness incentive rules under the Americans with Disabilities Act (ADA) and the Genetic Information and Nondiscrimination Act (GINA). This language was what the wellness industry has been waiting for since the EEOC [met](#) on the proposed rules on June 11, 2020.

The EEOC proposed these changes because of a court order issued in the [AARP v. EEOC case](#). In that case, the judge agreed with the EEOC that the rules issued in 2016 needed to be revised.

Just as we were wrapping our heads around the numerous, [surprising changes](#) to the ADA and GINA rules, we learned that the new Biden Administration has halted all administrative rules. This is not surprising given that is often the prerogative of new presidential administrations. You can read about the process of halting rules [here](#). Then, the Biden administration appointed Commissioner Charlotte Burrows to Chair of the EEOC. This is significant as she was the most vocal in opposing many of the provisions of the proposed ADA and GINA rules at the June 11, 2020 meeting. Specifically, Commissioner Burrows objected to reviving the ADA Safe Harbor, which would allow health contingent, group health plan wellness programs to impose higher incentives, as well as removing the ADA notice requirement. If and when these rules are released in the Federal Register, I suspect they will be different from the ones released on January 7, 2021.

The Center for Health and Wellness Law, LLC will keep you apprised as developments from the EEOC occur.

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Top Three Legal Considerations for Complementary and Alternative Healthcare Providers

By Barbara J. Zabawa, JD, MPH

Complementary and Alternative Medicine (CAM) Providers are an essential part of a vibrant health and wellness system. CAM provider disciplines include chiropractic, acupuncture, functional medicine, integrative medicine, spiritual healing, mindfulness meditation, reiki, ayurvedic medicine, massage, and coaching to name a few. CAM providers typically operate outside traditional health care provider systems, such as hospitals or physician clinics. Often, CAM providers are entrepreneurs who go into business to serve patients or clients because conventional medicine has failed those patients or clients. In my experience as a health lawyer who focuses on serving as the attorney for alternative medicine providers, as well as a patient myself, many clients crave CAM provider services.

Because CAM providers often straddle the worlds of traditional health care and alternative health care, they get caught in legal compliance confusion. There are many questions as to whether traditional health care laws apply to CAM providers. The answer of course is that whether traditional health care laws, such as fraud and abuse laws, Medicare and Medicaid coding laws, Food & Drug Administration laws, HIPAA requirements, state licensure laws, to name a few, depends on the facts and circumstances of each case. That's why it is imperative that CAM providers hire a lawyer who is familiar with the CAM legal landscape. Based on my experience working as a CAM lawyer, here are the top five legal issues I see impacting CAM providers:

1. Staying with one's Scope of Practice.

Scope of practice is a concept relating to state licensure. Many CAM providers do not have state licensure, like health and wellness coaches, ayurvedic and reiki practitioners and some naturopathic doctors, to name a few. Other CAM providers, like chiropractors, acupuncturists or functional medicine providers, may have a license to practice their profession in one state, but not other states. With the growth in virtual practice or telehealth, CAM providers may find themselves wanting to expand their services to states in which they do not have a license, or states that do not recognize their practice as a licensed profession.

A legal risk for CAM providers concerns stepping outside of the scope of their license (if they have one), or offering services that creep into a licensed profession (if they do not have that license). In either case, the CAM provider could be accused of unlicensed practice. Specific to many health and wellness professionals, depending on state law and the circumstances, individuals providing nutritional advice potentially could be subject to state prohibitions against unlicensed practice of various professions, including: medicine, psychology and counseling, and nutrition and dietetics.

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State statutes define the practice of “medicine” very broadly, typically in terms that involve diagnosis, prevention, treatment, or operation with respect to diseases or human ailments. The courts often interpret words such as “prevention” and “treatment,” broadly. This means that non-licensed practitioners of the healing arts can easily run afoul of prohibitions against unlicensed medical practice.

In contrast to the “unlimited” scope of medical licensing, CAM providers like chiropractors have a limited scope of practice, which is defined by statute, regulations, and/or case law. For example, typical statutes provide that chiropractors can manipulate the spine to facilitate the free flow of nerve energy; acupuncturists can perform acupuncture needling, and while they have some diagnostic and therapeutic authority, this is limited to the categories and repertoire of traditional oriental medicine.

Some states carve out exceptions to unlicensed practice if the CAM professional follows certain guidelines. For example, anyone in California can provide nutritional advice or give advice concerning proper nutrition, so long as they do not practice “medicine.”¹ Under this statute, the terms “providing nutritional advice or giving advice concerning proper nutrition” mean the giving of information as to the use and role of food and food ingredients, including dietary supplements. The individual must post a designated notice “in an easily visible and prominent place” as follows:²

NOTICE

State law allows any person to provide nutritional advice or give advice concerning proper nutrition--which is the giving of advice as to the role of food and food ingredients, including dietary supplements. This state law does NOT confer authority to practice medicine or to undertake the diagnosis, prevention, treatment, or cure of any disease, pain, deformity, injury, or physical or mental condition and specifically does not authorize any person other than one who is a licensed health practitioner to state that any product might cure any disease, disorder, or condition.”

Another carveout in California, or safe harbor, commonly known as “SB 577,” allows unlicensed CAM providers to practice their trade as long as they disclose to the client in a written statement, using plain language, the following:³

- a. That he or she is not a licensed physician.

¹ B&P Code, Section 2068.

² The statute provides: “The notice required by this section shall not be smaller than 8 1/2 inches by 11 inches and shall be legibly printed with lettering no smaller than 1/2 inch in length, except the lettering of the word “NOTICE” shall not be smaller than 1 inch in length.”

³ *Id.*, §2053.6.

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- b. That the treatment is alternative or complementary to healing arts services licensed by the state.
- c. That the services to be provided are not licensed by the state.
- d. The nature of the services to be provided.
- e. The theory of treatment upon which the services are based.
- f. His or her educational, training, experience, and other qualifications regarding the services to be provided.

- (2) Obtain a written acknowledgement from the client stating that he or she has been provided with the information described in paragraph (1). The client shall be provided with a copy of the written acknowledgement, which shall be maintained by the person providing the service for three years.

Such licensing exemptions for alternative practitioners may also exist in other states⁴, however, other states, such as Florida, may actively pursue unlicensed practitioners of alternative medicine where the state interprets the activity as violating licensing regulations.

Legal definitions of each profession vary by state, as do enforcement priorities.

2. Ordering Labs

Similar to the scope of practice issue, many clients of our firm ask whether they can order labs as a CAM provider. When a CAM provider looks at lab test results or other health history forms and then creates a recommendation or treatment plan based on those results, it could be argued that such conduct is equivalent to “treating” a person for a “disorder” or other physical or mental condition. The more the CAM provider gives personalized recommendations based on lab results or health history forms, the more likely one could interpret such actions as the practice of a licensed profession for which the CAM provider does not hold a license.

From a legal risk perspective, it is best for unlicensed CAM providers to avoid personalized treatment plans as much as possible and instead offer more generalized education and resources while recommending at all times that the client consult their primary care physician for specific conditions.

3. HIPAA Compliance

The privacy and security rules of the Health Insurance Portability and Accountability Act (HIPAA) generally have not caught up to CAM practices. This is because many CAM providers do not bill

⁴ We have limited our discussion to California and Florida in consideration of your financial limitations, however, per our previous discussions, that the laws for alternative healers vary from state to state. Here we use SB577 as the model for disclosures and provide general legal guidance for application in other jurisdictions, and have not researched across states, merely introducing CA and FL rules as an examples.

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insurance, calling into question the applicability of HIPAA privacy and security rules to the typical CAM practice. HIPAA applies only to “covered entities.” There are three types of covered entities:

1. Health care providers
2. Health plans
3. Health care clearinghouses

The most likely covered entity category for CAM providers is “health care provider.” However, for a health care provider to qualify as a HIPAA covered entity, that provider must also conduct HIPAA “standard transactions” electronically. These transactions are typically associated with electronic billing between the provider and health plans, such as electronic claims submission or prior authorization submissions. Many CAM providers do not bill insurance for their services. Thus, it may be that for many CAM providers, HIPAA privacy and security rules do not apply to their practices. However, states may have privacy and security rules with which the CAM provider must comply, so it is important to work with your CAM lawyer to understand your privacy and security obligations. Even if there are no laws specific to CAM provider practice, your patients will likely expect privacy and security standards similar to HIPAA. So, CAM providers may wish to voluntarily adopt HIPAA privacy and security standards to give their clients more comfort about their use and disclosure of health information.

The federal Department of Health and Human Services has [issued a guidance document](#) to help you decide whether HIPAA applies to you.

If you have questions about the use of telehealth in your wellness offerings, please contact the [Center for Health and Wellness Law](#) for assistance.

Frequently Asked Workplace Wellness Compliance Questions

Q: What else could be considered an activity-based health contingent program? It seems a lot of programs will want to go this route if they are interested in stronger incentives but not in an outcomes-based program...can a biometric screening or other similar "activity" be considered as an "activity-based" health contingent program, or is it really limited to walking-type programs?

A: Activity based wellness programs are defined by the HIPAA/ACA rules as a wellness program that requires an individual to perform or complete an activity related to a health factor in order to obtain a reward but does not require the individual to attain or maintain a specific health outcome. See 78 Fed. Reg. at 33182 (June 3, 2013).

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The [Center for Health and Wellness Law](#) has helped numerous clients navigate these very murky waters. Contact us today to help us guide you to a compliance path that works for you.

Register for the Quizzify Webinar on the Proposed EEOC Wellness Incentive Rules!

Register for the webinar here: https://us02web.zoom.us/webinar/register/WN_2N0-8zQgTtGEY4so4qT-Xg

Webinar Speakers

Barbara Zabawa (Founder and President @The Center for Health and Wellness Law)
Barbara J. Zabawa JD, MPH, is the founder and President of the Center for Health and Wellness Law, LLC, a law firm dedicated to improving legal access and compliance for the health and wellness industries. She is lead author of the book Rule the Rules on Workplace Wellness Programs, published by the American Bar Association. She is a frequent writer and speaker on health and wellness law topics, having presented for national organizations such as WELCOA, National Wellness Conference, HPLive, Healthstat University and HERO.

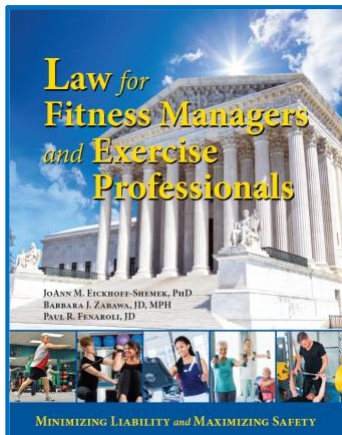
Al Lewis (CEO @Quizzify)

Al Lewis JD is CEO of Quizzify, the leading employee health literacy company, and author of three trade-bestselling books on wellness. He is also the co-founder of the Validation Institute. Forbes named him one of the 13 “unsung heroes” in healthcare. His work on wellness has been published in Health Affairs and in the Wall Street Journal, and his best-known “hack,” to prevent surprise bills for non-elective care, was featured in the New York Times. And this EEOC hack is as good as that one!

Need CEUs? Wellness Compliance Institute’s Self-Study Course has been Approved for 21 CEUs by HRCI, ACSM, MCHES, CHES and the States of Wisconsin, Indiana, Ohio and Michigan Insurance Commissioners!

The [Wellness Compliance Institute](#), (WCI) a 501(c)(3) nonprofit, is now offering a self-study course on wellness compliance. The course has been approved for 21 Continuing Education Credits or Units from HRCI, ACSM, MCHES, CHES and the insurance commissioners for Wisconsin, Indiana, Michigan and Ohio. Visit the WCI webpage under [Continuing Education](#) to learn more and register for the course.

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Attorney Barbara Zabawa Co-Authors *Law for Fitness Managers and Exercise Professionals!*

Lead author JoAnn Eickhoff-Shemek has published the Second Edition of *Law for Fitness Managers and Exercise Professionals*. The book is 521 pages of valuable legal information for those who work in the fitness industry. You can purchase the book by clicking [here](#).

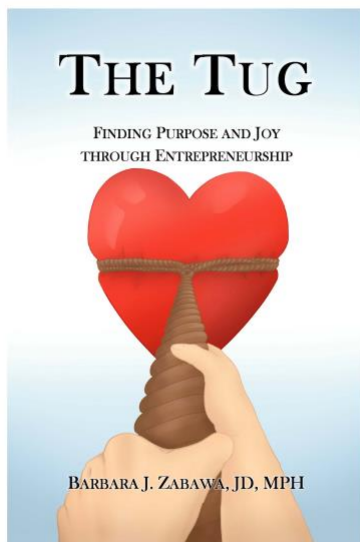
Coming in 2021...

- **Rule the Rules of Workplace Wellness Programs will be revised. Stay tuned...**



The first comprehensive book regarding workplace wellness program compliance is now available for purchase. Order online at www.wellnesslaw.com!

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Attorney Barbara Zabawa will be releasing a new book on entrepreneurship called ***The Tug: Finding Purpose and Joy through Entrepreneurship*** through Henschel Haus Publishing.

Attorney Barbara Zabawa starts the Lemonspark Podcast!

Barbara has revived [Lemonspark](#), a concept she created in 2008, as a podcast featuring stories from people who have turned life's lemons into a story of hope and inspiration. If you are looking for a sense of community with people who have faced life's lemons and prevailed, tune into the Lemonspark podcast, which tries to release a new episode once per week. You can find the podcast on Spotify, Google Podcasts, Apple Podcasts and iHeart Radio, as well as by clicking [here](#). Follow Lemonspark on Facebook, LinkedIn and Instagram too!

Follow us on Social Media!

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You can follow Barbara Zabawa and get even more updates about wellness compliance issues through:

Twitter: @wellnessatty

LinkedIn: www.linkedin.com/in/barbarazabawa

Instagram: wellnessattorney

Facebook: @centerforhealthandwellnesslaw

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